No. 12880

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

GUY F. ATKINSON CO., A CORPORATION, AND J. A. JONES CONSTRUCTION CO., A CORPORATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
DOMINICK L. MANOLI,
MELVIN POLLACK,
Attorneys,
National Labor Relations Board.

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JURISDICTION

This case is before the Court upon petition of the National Labor Relations Board for enforcement of its order issued against respondent on June 8, 1950, pursuant to Section 10 (c) of the National Labor Relations Act, as amended.[1] The Board's decision and order (R. 47–103) are reported in 90 N. L. R. B. No. 27. This Court has jurisdiction under Section

[1] The National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151 *et seq.*), herein called the Act, was amended by Section 101 of Title I of the Labor Management Relations Act, effective August 22, 1947 (61 Stat. 136, 29 U. S. C., Supp. III, Sec. 151, *et seq.*). Relevant portions of the original and amended Acts appear in the Appendix, *infra*, pp. 22–26.

10 (e) of the Act, as amended, because the unfair labor practice in question occurred within this judicial circuit in the course of respondent's operations in the vicinity of Richland, Washington.

STATEMENT OF THE CASE

I. The Board's findings of fact and conclusions of law [2]

Briefly, the Board found that respondent violated Section 8 (a) (3) and (1) of the Act by discharging Employee Chester R. Hewes pursuant to a closed shop contract executed by respondent and Local 370, International Union of Operating Engineers, AFL (hereinafter called the Operating Engineers) which did not satisfy the requirements of the operative exculpatory proviso to Section 8 (3) of the original Act [3] (R. 50–54, 83–85, 88). The Board also found that respondent in violation of Section 8 (a) (1) of the Act rendered illegal assistance to the Operating Engineers (R. 54, n. 14, 92).

The facts as found by the Board, and as shown by the evidence, may be summarized as follows: [4]

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[2] The Board adopted the findings, conclusions, and recommendations of the Trial Examiner with certain additions and modifications (R. 48–54).

[3] The ban on closed-shop contracts effected by Section 8 (a) (3) of the amended Act is not applicable to this contract, which was executed before August 22, 1947, the effective date of the amendments to the Act, and therefore, if valid under the proviso to Section 8 (3) of the original Act, would come under the saving terms of Section 102 of the amended Act (*infra*, p. 26).

[4] In the following statement record references preceding the semicolon, if one appears, are to the Board's findings; succeeding references are to the supporting evidence.

A. Respondent's operations

Guy F. Atkinson Co. and Jones Construction Co. (collectively called respondent) are engaged in a joint venture to construct buildings, facilities and other items in connection with the Hanford Engineering Works Project of the United States Atomic Energy Commission (R. 66–67, 67–68; 7, 13, 139–140, 180). The work was undertaken pursuant to an agreement made by respondent on July 25, 1947, with the General Electric Company, the prime contractor on the project (R. 66; 7, 13, 140). The total cost of the construction work undertaken by respondent was estimated at $8,000,000 (R. 68–69; 180, 188, 192). Respondent's principal place of business is located at Richland, Washington (R. 66; 7, 13, 140). In the course of its business operations, respondent, during the period from July 29, 1947, to April 6, 1948, purchased approximately $20,000,000 worth of construction materials, equipment, and supplies for delivery at Richland (R. 66; 8, 13, 140). Approximately $2,500,000 worth of these articles were transported to respondent from points outside the State of Washington (R. 66; 8, 13, 140). In addition, approximately $9,500,000 worth of these articles were produced in other states and thereafter were transshipped to respondent from points within the State of Washington (R. 67; 8, 13, 140–141).

Upon these facts, the Board found (R. 48–49, 67) that respondent's operations affect commerce within the meaning of the Act and also that in view of the magnitude of respondent's operations and their substantial effect upon interstate commerce, it would ef-

fectuate the policies of the Act for the Board to exercise jurisdiction in this case.

B. The unfair labor practices

1. *The closed-shop contract between respondent and the Operating Engineers*

On August 16, 1947, respondent and numerous affiliates of the Building and Construction Trades Council, AFL, including the Operating Engineers, executed a closed-shop contract, effective as of August 1, 1947, for a period of one year and thereafter from year to year unless terminated by timely notice[5] (R. 50, 69; 9, 13, 147–160, 176). The contract, among other things, provided that its terms were to cover all employees who were members of the signatory unions and that the respective signatory unions were to be recognized as the sole and exclusive bargaining agent of the employees in the respective crafts (R. 69; 148–149). The contract further provided that respondent retain in its employment only members of the respective unions in good standing or those who signified their intention of becoming members and that respondent upon notice from the appropriate union release from employment any employee who failed to maintain in good standing his membership in the union or defaulted in his obligations to the union (R. 9, 13, 69–70; 149–150).

The construction project, which respondent had undertaken and which was known to be a very extensive one, was in its early stages when the above contract

[5] This contract was superseded by an open-shop contract on August 10, 1948 (R. 163–172, 173, 182–184).

was executed (R. 51, 70; 180, 185–186, 188–189). At that time respondent had in its employ a skeleton working force of only 125 construction workers, including 10 operating engineers (R. 51–52; 145, 146, 179). By December 31, 1947, a little over four months after the closed-shop contract was executed, respondent's work force had expanded to 5400 construction workers, including 740 operating engineers (R. 52; 145, 146).

2. *The discharge of Hewes at the request of the Operating Engineers*

In October 1947, Hewes, a member of the International Association of Machinists, herein called the Machinists, applied for work as a machinist at respondent's personnel office (R. 70–71; 174, 193–194). He was told that closed-shop conditions prevailed and was referred to the office of the Operating Engineers at Pasco, Washington (R. 71; 193, 194). Hewes reported to the Pasco office where the union's business manager, Ray Clarke, informed him that in order to obtain work on the project, he would have to relinquish his membership in the Machinists, by surrendering his Machinists' dues book and apply for membership in the Operating Engineers (R. 71; 193, 194–195). Hewes refused to do so (R. 71; 195). He later returned to Clarke's office and after further discussion Clarke issued to him a so-called introduction card assigning him to work with respondent as a machinist (R. 71–72; 195–196). Hewes was permitted to retain his Ma-

chinists' dues book but was required to apply for membership in the Operating Engineers (R. 72; 196). Hewes also agreed to pay an initiation fee of $40 (*ibid.*). Hewes reported for work at the project on or about November 4, 1947, and was assigned to work in a machine shop (R. 72; 174, 193, 196).

On February 16, 1948, the Operating Engineers requested respondent to remove Hewes from the project because Hewes had "absolutely failed in his financial obligation to this Local Union" (R. 72–75; 162, 177). Two days later, after having satisfied itself that the discharge of Hewes was required under its contract with the Operating Engineers, respondent terminated Hewes' employment (R. 75; 143, 161, 177–179, 196–197).

3. *The Board's conclusions as to the discharge of Hewes and illegal assistance rendered to the Operating Engineers*

Upon the foregoing facts, the Board concluded (R. 53–54, 88) that the contract between respondent and the Operating Engineers was not a valid closed-shop contract under the governing proviso to Section 8 (3) of the original Act and therefore it afforded to respondent no defense to the otherwise discriminatory discharge of Hewes. The trial examiner reached that conclusion on the ground that, as he found (R. 83), the record contained no showing that when the contract was executed the union represented any of respondent's employees in the unit covered by the contract and therefore the contract did not come within the exemption

contained in the proviso to Section 8 (3). The Board found it unnecessary to determine whether or not the union represented any of respondent's employees on the date the contract was executed. The Board concluded, however, that since the contract was executed at a time when respondent's working force was not at all representative of that shortly to be employed and to be covered by the contract, the Operating Engineers could not have been, as required by the proviso to Section 8 (3), the representative designated by a majority of the employees in the bargaining unit and the contract was therefore invalid (R. 52, 84; 179–181). Accordingly, the Board found (R. 54, 88) that respondent's discharge of Hewes pursuant to the contract was violative of Section 8 (a) (3) and 8 (a) (1) of the amended Act.

The Board further found (R. 54, n. 14, 92) that respondent rendered illegal assistance to the Operating Engineers in violation of Section 8 (a) (1) of the Act by recognizing the union as the exclusive bargaining representative of its operating engineers although a majority thereof had not so designated the union, by requiring its employees to become and remain members of the union, thereby enhancing its prestige, and by discharging Hewes, thereby enforcing its illegal recognition of the Operating Engineers.

II. The Board's order

The Board's order (R. 55–60) requires respondent to cease and desist from recognizing the Operating Engineers as the representative of any of its em-

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ployees and from performining or giving effect to any contract with the Operating Engineers, unless and until the Operating Engineers shall have been certified by the Board; discouraging membership in the Machinists and encouraging membership in the Operating Engineers by discriminating against any of its employees, and from in any like or related manner interfering with, restraining or coercing its employees in the exercise of their rights under the Act. It further requires respondent to offer Hewes reinstatement with back pay, and to post appropriate notices.

III. Questions presented

1. Whether the Board properly found that respondent discriminatorily discharged employee Hewes in violation of Section 8 (a) (3) and (1) of the Act.

2. Whether the Board properly found that respondent rendered illegal assistance to the Operating Engineers in violation of Section 8 (a) (1) of the Act.

3. Whether the Board's order is proper and valid.

SUMMARY OF ARGUMENT

I. The Board properly found that respondent discriminatorily discharged Employee Hewes in violation of Section 8 (a) (3) and (1) of the Act. The closed shop agreement between respondent and the Operating Engineers does not afford a defense to that discharge. The agreement was executed at a time when the number of employees in the bargaining unit was not, because of respondent's expanding operations, representative of respondent's anticipated work force. The agreement under established policies

of the Board therefore fails to satisfy the requirement of the controlling proviso to Section 8 (3) of the original Act because the union was not the bargaining representative designated by a majority of the employees in the collective bargaining unit.

II. The Board properly found that respondent rendered assistance to the Operating Engineers in violation of Section 8 (a) (1) of the Act. The recognition of the union as the exclusive bargaining representative of the employees in question and the enforcement of the closed shop agreement, although the union had not been designated the statutory representative by a majority of the employees, was in derogation of the rights of employees to bargain collectively through representatives of their own choosing and impaired their freedom in the exercise of the rights guaranteed by the Act.

III. The Board's order is proper and valid.

ARGUMENT

POINT I

The Board properly found that respondent discriminatorily discharged Employee Hewes in violation of Section 8 (a) (3) and (1) of the Act

Respondent's discharge of Hewes because of his nonmembership in the Operating Engineers is an elementary violation of Section 8 (a) (3) and (1) of the Act unless the closed-shop contract between the union and respondent, pursuant to which it was made, was valid under the controlling proviso to Section 8 (3) of the original Act. *N. L. R. B.* v.

Electric Vacuum Cleaner Company, 315 U. S. 685, 694; *N. L. R. B.* v. *Cowell Portland Cement Co.,* 148 F. 2d, 237, 242–243 (C. A. 9), certiorari denied, 326 U. S. 735. The issue, therefore, is whether the Board properly found that the agreement failed to satisfy the requirements of the proviso.

Section 8 (3) of the original Act, like Section 8 (a) (3) in the amended Act, made it unlawful for an employer to discriminate against employees by reason of their membership or nonmembership in a union. The proviso to Section 8 (3) of the original Act, however, exempted from the prohibition of the Section any such action taken by the employer pursuant to a closed-shop contract executed in conformity with the requirements of the proviso. That proviso declared,

> * * * nothing in this Act * * * shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment, membership therein, if such labor organization is the representative of the employees, as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

Section 9 (a) provides that—

> Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive rep-

> resentatives of all the employees in such unit for the purposes of collective bargaining * * *

The Act in Section 9 thus adopts "the principle of majority rule * * * a rule that 'is sanctioned by our governmental practices, by business procedure, and by the whole philosophy of democratic institutions.' S. Rep. No. 573, 74th Cong., 1st Sess. p. 13." *N. L. R. B.* v. *A. J. Tower Co.,* 329 U. S. 324, 331. Section 7 of the Act also guarantees to employees the right "to bargain collectively through representatives of their own choosing." And Section 9 (b) of the Act imposes upon the Board the duty "to assure to employees the fullest freedom" in selecting representatives of their own choosing. Within this framework, "Congress has entrusted the Board with a wide degree of discretion" to establish policies and procedures and to make "practical adjustments" designed to afford to employees the fullest freedom in their choice of bargaining representatives and to insure that the choice of representatives reflects "the will of the majority of the electorate." *Tower* case, *supra.*[6]

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[6] The Senate Committee, which reported on the amendments to the original Act, adopted in the amended Act, has stated (S. Rept. No. 105, 80th Cong., 1st Sess., p. 10) :

"In recent years, the number of cases involving disputes with respect to the choice of bargaining representatives in the units which they shall represent have become the major business of the National Labor Relations Board. * * * In view of the tremendous number of such cases, therefore, it is of utmost importance that the regulations and rules of decision by which they are governed be drawn so as to insure to employees the fullest freedom of choice."

Cf. H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 47, "It must be emphasized that one of the principal purposes of the National

One of the "practical adjustments" which the Board in the exercise of this discretion has made is that the designation of a bargaining agent is inappropriate or ineffective if the number of employees in the bargaining unit is not, by reason of projected new or expanding operations, substantially representative of the employer's anticipated work force. Thus, for example, the Board declines to entertain, as premature, a petition filed under Section 9 of the Act requesting it to hold an election and determine the employees' choice of a bargaining agent, if "the unit sought is still expanding, and is not at present representative of the anticipated work force." *Coast Pacific Lumber Co.,* 78 N. L. R. B. 1245, 1246. Accord, *Westinghouse Electric Corporation,* 85 N. L. R. B. 1519; *Anaconda Wire and Cable Co.,* 91 N. L. R. B. No. 37. Similarly, the Board in that situation holds that a union may not act as the statutory bargaining representative of the employees in the unit and that a collective bargaining agreement between it and the employer establishing terms and conditions of employment is ineffective under the Act. *Daniel Hamm Drayage Co.,* 84 N. L. R. B. 458, enforced 185 F. 2d 1020; cf. *Chicago Freight Car and Parts Co.,* 83 N. L. R. B. 1163.[7]

The reasons which underlie the Board's policy in this respect are manifest. A contrary view, which would permit, in the circumstances under considera-

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Labor Relations Act is to give employees full freedom to choose or not to choose representatives for collective bargaining."

[7] See also National Labor Relations Board, *Eleventh Annual Report* (1946), p. 14, n. 26; *Ninth Annual Report* (1944), p. 27.

tion, the initial working force to designate the statutory bargaining agent, would mean that the choice of bargaining agent would reflect not the choice of a majority of the electorate but merely the preference of a nonrepresentative minority. The great number of employees on whose behalf the union would act as exclusive bargaining representative would have had no voice in that critical choice or opportunity to make known their wishes. One of the serious consequences flowing from such a view is illustrated by the instant case. A bargaining agent selected by a small nonrepresentative initial work force would be enabled to enforce closed-shop and other conditions of employment upon a vast number of employees who had been effectively foreclosed from selecting their bargaining representative or making known their wishes as to the terms or conditions of employment which the bargaining representative was authorized to seek on their behalf.

The Board's policy is designed to avoid such results so plainly inconsistent with the principle of majority rule adopted in the Act and the basic statutory policy of affording to employees the fullest freedom in the exercise of their right to bargain through representatives of their own choosing. We submit, therefore, that the Board's policy is not "without justification in law or in reason." *Tower* case, *supra,* p. 332.

The policy thus established by the Board, so clearly warranted by both law and reason, is dispositive of the instant case. The undisputed facts (*supra,* pp. 4–5) show that on August 16, 1947, respondent recognized the Operating Engineers as the exclusive

bargaining representative of members of that craft employed and to be employed by respondent and entered into a closed-shop contract with the union making membership in it a condition of employment. On that date respondent's operations on the Hanford project had just barely begun; all of the parties knew that these operations were in their initial stage and that they would be of an extensive nature requiring the employment of several thousand employees. On August 16, respondent had in its employ on the project only 125 manual employees. In the unit for which the Operating Engineers were recognized as exclusive bargaining representative, there were only ten operating engineers. Approximately four months later, respondent's initial work force had expanded to 5,400 manual employees. The number of operating engineers had increased to 740. It is thus clear that respondent's initial complement of operating engineers consisting of ten employees was not, at the time the closed-shop agreement was signed, representative of the work force contemplated and subsequently hired.

In these circumstances, the Board, consistent with its established policy, concluded that the Operating Engineers could not have been, as required by the proviso to Section 8 (3), the representative of a majority of the employees in the bargaining unit when the closed-shop agreement was executed. It follows, therefore, as the Board further found, that the closed-shop agreement does not satisfy the requirements of the proviso and hence affords no defense to respondent's discharge of Hewes.

We do not understand respondent to seriously challenge the general propriety of the Board's policy discussed above. Respondent challenges the Board's conclusion with respect to the invalidity of the contract under the proviso upon three grounds.

First, respondent urged before the Board (R. 52) that the contract was executed in accordance with the "historical pattern of labor contracting" adopted by employers and unions in the construction industry and therefore the proviso should be deemed inapplicable (R. 52; 13–14, 40–42). But this argument, as the Board pointed out (R. 52), overlooks the critical fact that Congress enacted no qualification and intended none[8] to the proviso based upon the custom in any industry. Pertinent here, therefore, is the observation in a related context of the Circuit Court of Appeals for the Second Circuit in *N. L. R. B.* v. *National Maritime Union of America,* 175 F. 2d 686 (C. A. 2), certiorari denied, 338 U. S. 954, quoting with approval from a decision of the Board (at p. 689).

> " 'We are asked by the Respondents to consider the economic facts which gave rise to the hiring hall in the maritime industry and which, in the view of the Respondents, require its continuance in the future. It is said that the peculiar characteristics of maritime employment require that a union control and regulate the supply of labor in order to avoid the graft, favoritism, and indignities which in past years have attended job-seeking in this industry. It

[8] S. Rept. No. 573, 74th Cong. 1st Sess., p. 11; H. Rept. No. 972, 74th Cong. 1st Sess., p. 17.

is also said that the Respondents' hiring halls have made possible a fair rotation of jobs, and an even supply of labor, in the best interests of seamen and shipowners alike. Insofar as such factors touch upon the wisdom of legislation which renders the NMU hiring halls unlawful, they, of course, raise considerations which can have no bearing on our determination of the issue before this Board. The full facts concerning the reasons for and operation of maritime hiring halls were brought to the attention of the Congress prior to the enactment of the amended Act. The Congress determined that the public interest required that hiring halls involving discrimination against employees who are not union members be outlawed. This determination is binding upon us. It is our duty to administer the law as written, not to pass upon the wisdom of its provisions.'

We, too, take that position. Sometimes, to be sure, the nature of a statute is such that impliedly it delegates to the courts, in interpreting it, the power and duty to round out the legislative legislation by judicial legislation which involves considerations of social policy. But where, as here, the legislature's purpose is plain, there is no room for such judicial 'lawmaking'."

Secondly, respondent urged before the Board (R. 53, 76–77, 85; 14–15, 31–33) that the contract should be exempted from the requirements of the proviso because it was executed in good faith by respondent and in response to the "exigencies of the construction program" undertaken by the Atomic Energy

Commission. Long ago this Court disposed of a similar contention in these words (*N. L. R. B.* v. *Star Publishing Co.*, 97 F. 2d 465, 470):

> The Act prohibits unfair labor practices in all cases. It permits no immunity because an employer may think that the exigencies of the moment require infraction of the statute. In fact, nothing in the statute permits or justifies its violation by employers.

See also *N. L. R. B.* v. *O'Keefe & Merritt Mfg. Co.*, 178 F. 2d 445, 449 (C. A. 9); *N. L. R. B.* v. *Hudson Motor Car Co.*, 128 F. 2d 528, 533 (C. A. 6); *N. L. R. B.* v. *Don Juan, Inc.*, 185 F. 2d 393 (C. A. 2).

Finally, respondent asserted (R. 48–49, 77; 15, 26–28) that the Board was estopped from exercising jurisdiction in the instant case [9] because the contract pursuant to which Hewes was discharged was executed when it was the Board's policy to decline to exercise jurisdiction over enterprises engaged in the construction industry. The Board properly rejected this contention. The past practice of the Board not to exercise jurisdiction over construction operations

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[9] Respondent also argued that its operations did not fall within the coverage of the Act and that the Board could not properly assert jurisdiction in the instant case. This contention can no longer be urged in view of the recent holdings of the Supreme Court in *N. L. R. B.* v. *Denver Building Trades Council*, 341 U. S. 675, and companion cases.

The additional contention urged by respondent that the Board could not properly assert jurisdiction over respondent's operations because the product of the Hanford atomic energy works is for use or consumption by the Government must be rejected in view of the ruling in *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 511–512.

in no way precludes the Board from exercising it now and finding contracts executed in violation of the Act to be invalid. That abstention, as the Board has stated (R. 48–49, 78–79), was based upon administrative choice rather than legal necessity and affords no support for respondent's contention. "The principles of equitable estoppel [cannot] be applied to deprive the public of the protection of a statute because of mistaken action or lack of action on the part of public officials." *N. L. R. B.* v. *Baltimore Transit Co.*, 140 F. 2d 51, 55 (C. A. 4), certiorari denied, 321 U. S. 795, and cases cited there; cf. *Wallace Corporation* v. v. *N. L. R. B.*, 323 U. S. 248, 253.

Point II

The Board properly found that respondent rendered illegal assistance to the operating engineers in violation of Section 8 (a) (1) of the Act

As we have shown above, pp. 9–14, the Operating Engineers were not the exclusive bargaining representative designated or selected by a majority of the employees in the bargaining unit when the closed-shop agreement was signed. The union was therefore neither entitled to recognition as the statutory representative nor to enforcement of its closed-shop contract. In these circumstances, respondent's unlawful recognition of the union as the statutory bargaining representative of the employees in question and its enforcement of the closed-shop contract by requiring as a condition of employment membership in the union and by discharging Hewes because of his nonmembership in the union constituted, as the Board found,

employer assistance to a labor organization banned by Section 8 (a) (1) of the Act. Such action on the part of an employer accords to the union a status to which it is not entitled, is in derogation of the rights of employees to bargain collectively through representatives of their own choosing and impairs the freedom which the Act guarantees to employees in the exercise of their rights under the statute. *N. L. R. B.* v. *Electric Vacuum Cleaner Co.,* 315 U. S. 685, 692–693; *N. L. R. B.* v. *Cowell Portland Cement Co.,* 148 F. 2d 237 (C. A. 9), certiorari denied, 326 U. S. 735; *N. L. R. B.* v. *Mason Mfg. Co.,* 126 F. 2d 810 (C. A. 9).

Point III

The Board's order is proper and valid

As already stated (*supra,* p. 7), the Board's order requires respondent to offer Hewes reinstatement to his former or equivalently substantial position with back pay. Before the Board, respondent challenged the validity of any Board order requiring it to reinstate Hewes with back pay because the latter did not seek reinstatement after the expiration of the closed-shop contract on August 10, 1948 (R. 54, n. 15; 30, 172). But it is well settled that it is not incumbent upon an employee discriminatorily discharged to take the initiative and seek reinstatement in order to make available the remedies provided by the Act. It is for the offending employer to remedy his illegal action by offering reinstatement to the discharged employee and thereby bring about "a restoration of the situa-

tion, as nearly as possible, to that which would have obtained but for the illegal discrimination" (*Phelps Dodge Corp.* v. *N. L. R. B.,* 313 U. S. 177, 194). *N. L. R. B.* v. *Cowell Portland Cement Co.,* 148 F. 2d 237, 245 (C. A. 9), certiorari denied, 326 U. S. 735; *N. L. R. B.* v. *East Texas Motor Freight Lines,* 140 F. 2d 404, 405 (C. A. 5); *United Biscuit Co* v. *N. L. R. B.* 128 F. 2d 771, 773 (C. A. 7).

The Board also ordered respondent to cease and desist from recognizing the Operating Engineers as the bargaining representative of any of its employees and from giving effect to the closed shop agreement or any extension thereof, unless or until the union has been certified by the Board as the statutory representative of respondent's employees, provided, however, that in no event shall this be construed as waiving any provisions of Section 8 and 9 of the Act, as amended (R. 55).[10] In view of the illegal assistance found, the Board was warranted in requiring respondent to withhold recognition from the union until such time as the Board may determine that the effect of that illegal assistance has been dissipated. The conditioning of recognition on a Board certification insures that the Board will have the opportunity to make such a determination. The injunction against giving effect to the contract is designed to avoid

[10] The amended Act permits the making of an agreement between the employer and the statutory bargaining representative requiring membership in the union as a condition of employment provided that a majority of the employees duly authorize the union to make such an agreement. Sections 8 (a) (3) and 9 (e) of the Act.

perpetuating the illegal assistance given to the union. The remedy prescribed by the Board in this respect is thus "adadpted to the situation which calls for a redress" (*N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 348). *N. L. R. B.* v. *Cowell Portland Cement Co.,* 148 F. 2d 237, 246 (C. A. 9), certiorari denied, 326 U. S. 735; *N. L. R. B.* v. *Graham Ship Repair Co.,* 159 F. 2d 787, 788 (C. A. 9); *Elastic Stop Nut Corp.* v. *N. L. R. B.,* 142 F. 2d 371, 380 (C. A. 8), certiorari denied, 323 U. S. 722, *N. L. R. B.* v. *Norfolk Shipbuilding & Drydock Corporation,* 172 F. 2d 813, 816 (C. A. 4).

CONCLUSION

It is respectfully submitted that the Board's findings are supported by substantial evidence on the record considered as a whole, that its order is valid and proper, and that a decree should issue enforcing the order in full as prayed in the Board's petition.[11]

GEORGE J. BOTT,
General Counsel,
DAVID P. FINDLING,
Associate General Counsel,
A. NORMAN SOMERS,
Assistant General Counsel,
DOMINICK L. MANOLI,
MELVIN POLLACK,
Attorneys,
National Labor Relations Board.

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[11] Since the Board issued its order in the instance case, the Operating Engineers have been certified by the Board as the bargaining representative of certain of respondent's employees at the Hanford project. *Matter of Guy L. Atkinson etc.*, Case No. 19–RC–646. This, of course, fulfills the condition subsequent contained in paragraphs 1 (a) and (b) of the Board's order. The remaining portions of the Board's order remain unaffected. We have no objection to the decree and the notice to be posted reciting that the condition stated in paragraphs 1 (a) and (b) of the order has been met with respect to the employees covered by the certification.

APPENDIX

The relevant provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49 Stat. 449, 29 U. S. C., Secs. 151, *et seq.*) are as follows:

Unfair Labor Practices

Sec. 8. It shall be an unfair labor practice for an employer—

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701–712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

* * * * *

Representatives and Elections

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the

exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. Supp. III, Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7; * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discour-

age membership in any labor organization: *Provided,* That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in Section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in Section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in Section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement:

* * * * *

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise. * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such

affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

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Effective Date of Certain Changes

Sec. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

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